Supreme Court, U.S.
FILED

No. _____ 09 641 NOV 30 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

FRED DOUGLAS VINING,

Petitioner,

vs.

APPLIED POWER TECHNOLOGY; PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY; WORKERS COMPENSATION APPEALS BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

FRED D. VINING
115 Lincoln Blvd.
New Kensington, PA 15068
724 472 5240

QUESTION PRESENTED

Does the Rooker-Feldman Exception Doctrine deprive the United States Courts from exercising jurisdiction under United States Constitution, Article III Section 2?

The Third Circuit Court of Appeals has entered an order, abused its discretion in the denial of Petition for Rehearing by refusing to allow Fourteenth Amendment rights held. And, denial of motion to reopen case, and motion to amend complaint under 28 U.S.C. § 133115(A) was manifest, and similarly demonstrated its intent to challenge the dismissal of District Court order in Civil Action # 02-2065 which involves Rooker-Feldman Doctrine and Eleventh Amendment, as futile, and voids Constitutional provision under United States Constitution, Article III Section 2.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT OF CERTIORARI	3
CONCLUSION	3

INDEX TO APPENDICES

Third Circuit Opinion ..... App. 1
District Court Order ..... App. 4
District Court Order ..... App. 8
Third Circuit Opinion ..... App. 9
District Court Order ..... App. 14
District Court Order ..... App. 17
District Court Order ..... App. 20
Third Circuit Order ..... App. 21
Third Circuit Order ..... App. 23

TABLE OF AUTHORITIES

Page

CASES

Rooker-Feldman Doctrine 2

Talifiaferro v. Darby Township Zoning Board, 458 F.3d 181 (3rd Cir. 2006) 3

CONSTITUTIONAL PROVISIONS

Fourth Amendment 2

Eleventh Amendment 2

Fourteenth Amendment 2, 3

United States Constitution, Article III Section 2 ..... 2, 3

STATUTES

28 U.S.C. § 133115(A) 2, 3

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix 1 to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix 4 to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was March 27, 2009.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 2, 2009, and a copy of the order denying rehearing appears at Appendix 21.

An extension of time to file the petition for a writ of certiorari was granted to and including Nov. 29, 2009 on October 2, 2009 in Application No. 09 A 304.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL PROVISION INVOLVED

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

United States District Court for the Western District of Pennsylvania Misapprehended Facts of Case No. 02-2065, Barred Further Appeal with Eleventh Amendment and Rooker-Feldman Doctrine, denied motion to reopen or amend Complaint. District Court's Order was Entered in Error Being Ineffectual.

Third Circuit Court of Appeals' denial of Petition for Rehearing affirmed District Court's Order that was Entered in Error, Violating Plaintiff's Civil and Federal Rights under Fourteenth Amendment and 28 U.S.C. § 133115(A) and Barred United States Constitution, Article III Section 2.

REASON FOR GRANTING WRIT OF CERTIORARI

Third Circuit Court of Appeals has entered a decision in conflict with the decision of other United States Courts of Appeals on the same important matter, and has decided an important federal question in a way that conflicts with a decision by a court of last resort, and acted in a manner inconsistent with due process of the Fourteenth Amendment when the important legal question presented herein was squarely before the panel: The Third Circuit's 2006 decision in Talifiaferro is particularly problematic when it comes to question of law regarding United States Court of Appeals subject matter jurisdiction arising under United States Constitution, Article III Section 2. Third Circuit Court of Appeals' denial of petition for hearing and, the Panels' issuance of summary order without a statement of reasons affirming the District Courts' dismissal of the adversary complaint would present a specific legal question that would concern public of the issuance of order and disregard mandate to be heeded under 28 U.S.C. § 133115(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED DOUGLAS VINING

App. 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3855

FRED DOUGLAS VINING,

Appellant

v.

APPLIED POWER TECHNOLOGY;
PENNSYLVANIA DEPARTMENT OF
LABOR AND INDUSTRY; WORKERS
COMPENSATION APPEALS BOARD

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cv-02065)
District Judge: Honorable Gary L. Lancaster

Submitted for Possible Dismissal Pursuant to
28 U.S.C. § 1915(e)(2)(B) or Summary Action
Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6
February 12, 2009

Before: McKEE, FISHER and
CHAGARES, *Circuit Judges*

(Filed: March 27, 2009)

OPINION

PER CURIAM

On March 18, 2005, this Court affirmed the District Court's grant of a motion to dismiss Vining's original case under Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Vining, proceeding pro se, then filed on October 12, 2005, a motion to reopen the case in the District Court, stating only that the "District Court decision conflicts with decision of the Third Circuit Court of Appeals." The District court denied his motion without explanation on October 18, 2005. Nearly three years later, Vining filed a motion to proceed in forma pauperis and a motion for leave to file an amended complaint, both of which the District Court denied without explanation. Vining then filed the instant appeal on September 11, 2008, and this Court granted his IFP motion.

We have appellate jurisdiction over this appeal under 28 U.S.C. § 1291, and review it for possible dismissal under 28 U.S.C. § 1915(e)(2)(B). An appeal must be dismissed under 28 U.S.C. § 1915(e)(2)(B) if it has no arguable basis in law or fact. *Neitzke v. Williams,* 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Because we determine that the appeal is lacking in arguable legal merit, we will dismiss it under 28 U.S.C. § 1915(e)(2)(B).

Vining's motions are subject to the requirements of Fed. R. Civ. P. 7(b)(1), which states that motions must "be in writing unless made during a hearing or trial; state with particularity the grounds for seeking the order; and state the relief sought." However, Vining offered the District Court nothing in support of any of his motions. The District Court had no basis on which to reopen his case, grant his IFP motion, or grant him leave to amend his complaint. Similarly, this Court finds nothing, construing his submissions as broadly as possible, that demonstrates the District Court erred in dismissing Vining's motions. *See Alston v. Parker*, 363 F.3d 229, 234 (3d Cir. 2004) ("pro se complaints in particular should be construed liberally.").

As a result, we determine that Vining's appeal is lacking in arguable legal merit, and will dismiss it pursuant to 28 U.S.C. § 1915(e)(2)(B).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

FRED DOUGLAS VINING, Plaintiff, v. UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, APPLIED POWER TECHNOLOGY, PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, WORKMENS COMPENSATION APPEALS BOARD, et al., Defendants.	)	Civil Action No. 06-16

MEMORANDUM ORDER

(Filed Jan. 20, 2006)

Gary L. Lancaster,
District Judge. January 19, 2006

Before the court are plaintiff's motion for leave to proceed *in forma pauperis* and *pro se* complaint. For the reasons that follow, plaintiff's motion will be granted, and his complaint dismissed.

I. BACKGROUND

This is the second complaint plaintiff has filed in this court *pro se*. The first complaint was filed on December 22, 2002 and docketed at 02-2065. That complaint was dismissed by the court for the reasons

set forth in the Memorandum Order dated May 19, 2003. Plaintiff filed a timely appeal to the United States Court of Appeals for the Third Circuit at No. 03-2576. This court's original order dismissing the complaint was affirmed in a *per curiam* opinion dated December 22, 2004. Plaintiff has now filed this complaint in which he simply adds the United States District Court for the Western District of Pennsylvania as an additional defendant and essentially claims that the court violated his rights by dismissing his complaint.

II. DISCUSSION

A. Motion for Leave to Proceed In Forma Pauperis

We first address plaintiff's motion for leave to proceed *in forma pauperis*.

Congress has authorized the federal courts to allow a party to proceed with the commencement, prosecution, or defense of an action *in forma pauperis*. 28 U.S.C. § 1915(a). In doing so, Congress recognized the public policy concern that persons who are unable to pay fees or give security should be permitted to prosecute or defend actions that affect their legal rights. Because it appears that plaintiff is unable to pay the costs associated with commencing this action, we will grant her leave to proceed *in forma pauperis*.

B. Complaint

Next, we turn to plaintiff's complaint.

In enacting section 1915, Congress granted the courts an extra measure of authority when evaluating an *in forma pauperis* action. Under that section, the court shall dismiss such an action if it determines that the action is frivolous, or fails to state a claim on which relief may be granted. *Id.* at §§ 1915(e)(2)(b)(I), (ii). If it so finds, the court may dismiss a claim *sua sponte,* even before the summons issues. *Johnstone v. United States,* 980 F. Supp. 148, 150 (E.D. Pa. 1997).

A complaint is frivolous if it is "based on an indisputably meritless legal theory," or sets forth "clearly baseless" factual contentions. *Neitzke v. Williams,* 490 U.S. 319, 327 (1989). Moreover, a complaint fails to state a claim if, with all well-pleaded allegations taken as true, and viewed in the light most favorable to plaintiff, it does not state any valid claim for relief. *See ALA, Inc. v. CCAIR, Inc.,* 29 F.3d 855, 859 (3d Cir. 1994). The district court is of course immune from suit for decisions that it has rendered. Where a defendant is immune from suit, the claim is frivolous as a matter of law. *Pennebaker v. Chamber,* 437 F.2d 66 (3d Cir. 1970). This is clearly such a complaint.

III. CONCLUSION

For the foregoing reasons, the court will grant plaintiff's motion for leave to proceed *in forma pauperis,* but will dismiss her complaint as frivolous

and as failing to state a claim on which relief may be granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

FRED DOUGLAS VINING, Plaintiff, v. UNITED STATES COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, APPLIED POWER TECHNOLOGY, PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, WORKMENS COMPENSATION APPEALS BOARD, et al., Defendants.	)	Civil Action No. 06-16

ORDER

AND NOW, this 19th day of Jan 2006, upon consideration of plaintiff's motion for leave to proceed *in forma pauperis,* said motion is hereby GRANTED. It is FURTHER ORDERED that plaintiff's complaint is hereby DISMISSED, with prejudice.

BY THE COURT:

/s/ Gary L. Lancaster

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 03-2576

FRED DOUGLAS VINING,

Appellant

v.

APPLIED POWDER TECHNOLOGY;
PENNSYLVANIA DEPARTMENT OF LABOR
AND INDUSTRY; WORKERS
COMPENSATION APPEALS BOARD

On Appeal From the United States District Court
For the Western District of Pennsylvania
(D.C. Civ. No. 02-cv-02065)
District Judge: Honorable Gary L. Lancaster

Submitted Under Third Circuit LAR 34.1(a)
December 22, 2004

Before: SLOVITER, BARRY AND
STAPLETON, *CIRCUIT JUDGES*

(Filed: December 22, 2004)

OPINION

PER CURIAM

Fred Douglas Vining, pro se, appeals an order of the United States District Court for the Western District of Pennsylvania granting the defendants' motion to dismiss his complaint, which was brought primarily under the Americans With Disabilities Act ("ADA"). Vining's complaint arises from the termination of his employment and the denial of unemployment benefits. Vining is a former employee of now-dissolved Applied Powder Technology ("APT"), where he worked from 1990 to 1993. Vining claims that in 1993, APT harassed him regarding the terms and conditions of his employment and then terminated him for using sick leave. He allegedly required sick leave for aggravation of a lung condition and for injuries he received in a workplace fall.

Vining applied for unemployment benefits, which the Pennsylvania Department of Labor and Industry ("PDLI") denied because Vining filed his application one day too late.[1] Vining then filed a complaint with the Pennsylvania Human Relations Commission ("PHRC") because he "did not receive a hearing in [his] defense for being fired for being sick." The PHRC apparently dismissed Vining's charge because APT had been dissolved, and it recommended that he file a

---

[1] Vining maintains that his application was timely by virtue of the "3817 postal stamp." He does not make clear what exactly this is; however, it appears to be a form for certification of mailing.

proof of claim. It appears that Vining never did so. Vining also claims that he filed for "substantial weight review" with the EEOC in 1994, but has never received such review. Through counsel, Vining sought workers compensation and disability benefits from the Veterans Administration in 1994. Vining claims that the EEOC's failure to review his claim prejudiced all other claims he filed. He does not, however, specify what those claims are.

In December 2002, Vining filed the present action against APT, the PDLI and the Workers Compensation Appeals Board, claiming violations of the ADA and "due process." Vining did not clarify whether his claims are based on his discharge or his inability to obtain workers compensation. He sought back pay from the date of his discharge, compensatory and punitive damages, and workers compensation from the time of his original claim.

The state defendants moved for dismissal for lack of jurisdiction on the basis of the Eleventh Amendment's bar on suits against states for money damages in federal court. The District Court concluded that, as to Vining's ADA claim against APT, the claim was time-barred. As to the state defendants, the District Court concluded that Vining's ADA claims were barred by the Eleventh Amendment. The District Court further concluded that, to the extent that Vining's claims could be construed as an appeal from the denial of its application for workers compensation benefits, they were barred by the *Rooker-Feldman* doctrine. Accordingly, the District Court dismissed the complaint in

its entirety. Vining appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We agree with the District Court that Vining's complaint is less than clear. To the extent, however, that Vining is claiming a violation of the ADA, his claim is meritless. With respect to the state defendants, Vining's ADA claim is barred by the Eleventh Amendment because both entities are part of the state's executive branch. *See* 71 Pa. Cons. Stat. §§ 61, 67.1; *Lavia v. Pa. Dept. of Corr.*, 224 F.3d 190, 195 (3d Cir. 2000).

Moreover, Vining's ADA claim is time-barred.[2] The ADA does not have its own statute of limitations. The limitations period is, therefore, governed by 42 U.S.C. § 1988, which in this case directs use of Pennsylvania's two-year personal injury statute of limitations. *See Lake v. Arnold,* 232 F.3d 360, 368 (3d Cir. 2000). Vining's claim concerns alleged discrimination that occurred, at the latest, in 1993. Vining inexcusably failed to bring his ADA claim until 2002 – seven years too late.

Finally, insofar as Vining seeks review of the denial of workers compensation benefits, we agree

---

[2] In addition to being barred by the statute of limitations, with respect to APT, Vining's complaint is also barred by state laws regarding resolution of claims against dissolved corporations. Vining did not file a proof of claim within two years of APT's dissolution, as he was required to do. *See* 15 Pa. Cons. Stat. § 1979(a)(2).

with the District Court that his claim is prohibited by the *Rooker-Feldman* doctrine.

Accordingly, we will affirm the District Court's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

FRED DOUGLAS VINING, Plaintiff, v. APPLIED POWDER TECHNOLOGY and PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY, WORKERS COMPENSATION APPEALS BOARD, Defendants.	)	Civil Action No. 02-2065

ORDER OF COURT

Plaintiff, acting *pro se*, filed this suit against Applied Powder Technology and the Pennsylvania Department of Labor and Industry, Workers Compensation Appeals Board. He contends that he was once employed by Applied; however, he was discharged in September of 1993. In May of 1994, he applied for workers compensation benefits with the Pennsylvania Department of Labor and Industry. Apparently, his claim was denied.

He now brings this suit under the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189 ("ADA") as well as "due process of law." He seeks relief in the form of back pay from the time of his discharge, compensatory and punitive damages, as well as workers compensation benefits from the

time of the original claim. The Commonwealth defendants have filed a motion to dismiss. For the reasons that follow, the motion is granted.

Plaintiff's complaint is somewhat unfocused, however, to the extent that he is bringing the action against his former employer for his discharge under the ADA that claim is barred by the applicable statute of limitations. He was discharged in September of 1993. This complaint was not filed until December of 2002, more than eight years later. The statute of limitations under the ADA is two years. *Benedum v. Franklin Twp. Recycling Center,* 1996 WL 679402 (W.D. Pa. 1996). Therefore, the claim is barred by the applicable statute of limitations.

To the extent that the claim against the Pennsylvania Department of Labor and Industry and the Workers Compensation Appeals Board is also based on the ADA, the claim is additionally barred by the Eleventh Amendment to the United States Constitution. *See Lavia v. PA Department of Corrections,* 224 F.3d 190 (3d Cir. 2000).

To the extent, however, that his claim against the Commonwealth defendants can be deemed as an appeal from the decision denying him workers compensation benefits, that claim is barred by the Rooker-Feldman Doctrine.

Under the *Rooker-Feldman* doctrine, when a plaintiff seeks to litigate a claim in a federal court, a state court judgment in another case will bar the federal proceeding when entertaining the federal

court claim would be the equivalent of an appellate review of that state court judgment. *See Ernst v. Child & Youth Servs. of Chester County,* 108 F.3d 486, 491 (3d Cir. 1997). For that reason, the *Rooker-Feldman* doctrine applies when, to grant plaintiff the relief he seeks, the court must determine that the state court judgment was entered erroneously or when the court must take action that would render that state judgment ineffectual. *Id.* (quoting *FOCUS v. Allegheny County Court of Common Pleas,* 75 F.3d 834, 840 (3d Cir. 1992). *See also Marks v. Stinson,* 19 F.3d 873, 885-86 n.11 (3d Cir. 1994). That is the case here.

Defendant's motion to dismiss is granted. The Clerk of Court is directed to mark this case closed.

BY THE COURT:

/s/ Gary L. Lancaster ,J.
5/19/03

cc: All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

FRED DOUGLAS VINING, Plaintiff,	)	
v.	)	Civil Action No. 02-836
PENNSYLVANIA HUMAN RELATIONS COMMISSION, Defendant.	)	

MEMORANDUM ORDER

Gary L. Lancaster,
District Judge. May 7, 2002

Before the court are plaintiff's motion for leave to proceed *in forma pauperis* and *pro se* complaint. For the reasons that follow, plaintiff's motion will be granted, and his complaint dismissed.

I. BACKGROUND

Plaintiff's *pro se* complaint is somewhat unfocused; however, he appears to allege that his civil rights were violated by the Pennsylvania Human Relations Commission – the manner in which they processed a complaint he filed with that agency. It appears that he was discharged from his job in 1994 and was denied workers compensation benefits. He then filed a complaint with the PHRC and his claim was either denied or they failed to reach a final conclusion. In any event, he contends that they

violated his rights to due process of law and seeks money damages.

II. DISCUSSION

A. Motion for Leave to Proceed In Forma Pauperis

We first address plaintiff's motion for leave to proceed *in forma pauperis*.

Congress has authorized the federal courts to allow a party to proceed with the commencement, prosecution, or defense of an action *in forma pauperis*. 28 U.S.C. § 1915(a). In doing so, Congress recognized the public policy concern that persons who are unable to pay fees or give security should be permitted to prosecute or defend actions that affect their legal rights. Because it appears that plaintiff is unable to pay the costs associated with commencing this action, we will grant his leave to proceed *in forma pauperis*.

B. Complaint

Next, we turn to plaintiff's complaint.

In enacting section 1915, Congress granted the courts an extra measure of authority when evaluating an *in forma pauperis* action. Under that section, the court shall dismiss such an action if it determines that the action is frivolous, or fails to state a claim on which relief may be granted. *Id.* at §§ 1915(e)(2)(b)(i), (ii). If it so finds, the court may dismiss a claim *sua*

sponte, even before the summons issues. *Johnstone v. United States,* 980 F. Supp. 148, 150 (E.D.Pa. 1997).

A complaint is frivolous if it is "based on an indisputably meritless legal theory," or sets forth "clearly baseless" factual contentions. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Moreover, a complaint fails to state a claim if, with all well-pleaded allegations taken as true, and viewed in the light most favorable to plaintiff, it does not state any valid claim for relief. *See ALA, Inc. v. CCAIR, Inc.,* 29 F.3d 855, 859 (3d Cir. 1994). This is clearly such a complaint.

III. CONCLUSION

For the foregoing reasons, the court will grant plaintiff's motion for leave to proceed *in forma pauperis,* but will dismiss his complaint as frivolous and as failing to state a claim on which relief may be granted.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

FRED DOUGLAS VINING, Plaintiff, v. PENNSYLVANIA HUMAN RELATIONS COMMISSION, Defendant.	)	Civil Action No. 02-836

ORDER

AND NOW, this 7th day of May, upon consideration of plaintiff's motion for leave to proceed *in forma pauperis,* said motion is hereby GRANTED. It is FURTHER ORDERED that plaintiff's complaint is hereby DISMISSED, with prejudice.

BY THE COURT:

/s/ Gary L. Lancaster J.

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3855

FRED DOUGLAS VINING,
Appellant

v.

APPLIED POWER TECHNOLOGY;
PENNSYLVANIA DEPARTMENT OF LABOR
AND INDUSTRY; WORKERS
COMPENSATION APPEALS BOARD

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 02-cv-02065)
District Judge: Honorable Gary L. Lancaster

Present: SCIRICA, *Chief Judge*, SLOVITER,
McKEE, BARRY, AMBRO, FUENTES, SMITH,
FISHER, CHAGARES, JORDAN and HARDIMAN,
Circuit Judges.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR
REHEARING EN BANC

The petition for rehearing filed by Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ D. Michael Fisher
Circuit Judge

Dated: July 2, 2009
ARL/cc: FV; CRK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3855

Vining v. Applied Power Technology
(D.C. No. 2:02-cv-02065)

ORDER

It appearing that a panel of this Court disposed of the above case by an Opinion filed March 27, 2009, and it further appearing that a Petition for Rehearing En Banc was timely filed by Appellant on April 10, 2009, and it further appearing that the Clerk's Office erroneously issued the certified judgment in lieu of formal mandate on April 20, 2009,

It is ORDERED that the certified judgment issued in lieu of formal mandate on April 20, 2009, be and is hereby RECALLED.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: June 12, 2009

ARL/cc: FDV; CRK